

Independent Review

MBIE: Immigration New Zealand

Compliance function - Deportation and Detention activities

Michael Heron QC

Final Report
6 December 2018

Redactions in this document have been made consistent with specific sections of the Official Information Act 1982:

- 6(c) - the making available of that information would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detention of offences, and the right to a fair trial; and,
- 9(2)(a) - the withholding of the information is necessary to protect the privacy of natural persons, including that of deceased natural persons.

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Overview

Introduction

In June of this year, news media reported two deportation decisions made by the compliance division of Immigration New Zealand (**INZ**).

The first case involved a Mr Middleton, who immigrated to New Zealand and was detained with a view to deportation after having lived in New Zealand since he was four years old. He complained to the Minister of Immigration about his treatment by INZ.

The second case involved Ms L. She was deported following her making a complaint as a victim of a serious crime. In April 2018 MP Louisa Wall raised the circumstances of Ms L's deportation with the Minister of Immigration. When INZ management became aware of her case, her return to New Zealand was facilitated quickly. The Minister granted Ms L a work visa so that she could remain in New Zealand while her complaint was investigated.

As a result of these deportation decisions the Chief Executive of the Ministry of Business, Innovation and Employment (**MBIE**) commissioned an external review into the detention and deportation activities of INZ. The terms of reference for the review were published on 8 June 2018 (and are annexed at **Appendix 1**).

The legality of the decisions made by the Compliance Officers and their respective managers were assessed as sound on internal review. However, there were questions raised around how cases had been handled, why cases had been prioritised and whether Standard Operating Procedures (**SOPs**) and their application were operating effectively.

Review Process

The Compliance, Risk and Intelligence Services (**CRIS**) provided me with relevant documents to build an understanding of INZ Compliance processes including the current SOPs, a proposed sample of new SOPs, and the Induction, Designation and other training documents.

I reviewed the processes followed in the Mr Middleton case and the Ms L case. In addition to them, I was provided with an anonymised list to choose a sample of 12 additional case files from across INZ's four main offices (4 from Auckland, 1 from Christchurch, 4 from Hamilton and 3 from Wellington) to review for compliance.

From the selected cases, I conducted in-person interviews with INZ Compliance staff (both front-line COs and management-level staff) and other relevant MBIE staff who support the CRIS function such as the Legal and Communications teams. I then conducted follow-up interviews with select persons where relevant.

Summary

Below is a summary of my findings:

1. The roles and responsibilities within the Compliance function and engagement with MBIE support functions.

- a) A detailed discussion of the Compliance function together with the applicable legal framework is contained in the report (**Appendix 2**).
- b) Compliance and its officers form a vital part of the immigration system – without compliance activities the immigration system would fail to meet the requirements and the purpose set out in the Act.¹ The Compliance Officer (CO) role has changed over time. COs now have broader responsibilities which include a significant level of risk and complexity.
- c) There are at least three critical decisions within the CO role, which are to:
 - (i) Determine which cases are priority;
 - (ii) Determine whether a custodial option is appropriate; and
 - (iii) Determine whether to continue with deportation after personal circumstances are considered.

These decisions have two aspects – “can I” and “should I”. The first is legality, the second is appropriateness and reasonableness. The existing SOPs deal with the first well but not with the second. The SOPs do not discuss discretion in recognising sensitive issues.

- d) There is a lack of appropriate guidance from INZ leadership as to which cases are appropriate for prioritisation and why. There is also a lack of clarity on when detention should be exercised. The current prioritisation lacks nuance and is not effective for maximising the INZ Compliance function. Prioritisation within compliance does not operate in a strategic or coherent manner.²
- e) The compliance capability appears to be stretched. Deportation numbers have stayed relatively steady over the last few years whereas voluntary departures have increased, particularly in the last year.
- f) Compliance appears to be giving greater emphasis to alternatives such as voluntary departures and attempting to extract the maximum impact from stretched resources (e.g. 1,883 deportations and voluntary departures in 15/16 compared to 2,946 in 17/18 within a similar budget of \$1.6-\$1.7m).³ The current budget has been increased to \$2.3M on the basis of a small increase in Compliance staffing.

¹ Refer to Immigration Act 2009, ss 3(1) - 3(2).

² A similar finding was made in 2012 by Mr Rob Rope in the course of his report to the DCE of INZ, “Assessment and Advice for DCE relative to Fraud and Compliance”.

³ Refer to the figures on page 9.

g) Managers have a large number of reports, CO caseloads are high, technical and administrative support is thin. Despite the recent increase in voluntary departures, this environment contributes to a more reactive, enforcement-focused operation.

2. Whether operating practices, processes, oversight and ways of working are designed to support appropriate risk-based decision making.

- a) COs and managers operate in a sound culture, are dedicated to their roles, and operate responsibly and with empathy. There is no evidence in our review of the cases of a systemic “cultural” problem. Mr Middleton and Ms L were isolated decisions.
- b) My findings in respect to Mr Middleton and Ms L’s cases are consistent with the summary and recommendations arising from INZ’s internal review of those cases.
- c) The SOPs are designed to and do support appropriate risk-based decision making from a legal perspective (the “can I”). But appropriate risk-based decision making from a “should I” perspective is not well supported.
- d) There is a lack of a clear and uniform system for prioritising cases. It is left to managers and the judgement of COs, guided by an imprecise and potentially outdated priority system which is often subrogated to circumstances of immediacy. We observed practices which reflect a lack of nuanced prioritisation, including reacting to immediate cases without reflection on priorities – Ms L is evidence of this.
- e) With the new Police ability to access certain INZ information (through the API), Immigration and Compliance are likely to have more information flowing from Police and more pressure to respond. This in turn is likely to place pressure on COs to make decisions on non-priority cases like Ms L or Middleton.
- f) Continued and further emphasis should be given to lower-level compliance activities with the custodial option as last resort. Other options, including advice, encouragement to depart, reporting and residence requirements should be adopted more uniformly and utilised as appropriate. Mr Middleton is an example where other options could have been used earlier (if information about him was complete and accurate).
- g) INZ induction, designation and training appears to be unstructured and piecemeal. The overall impact of the initial induction phase is sound but could be more structured given variances between regional offices.
- h) MBIE support appears to be ad hoc but effective. In particular, legal and communications support seems well understood and when used, it is helpful and effective. There was widespread positive comment as to the quality of the legal support.
- i) There is no current Compliance data analytics or tools used by COs when prioritising or triaging caseloads.⁴ The CO is unlikely to be able to say, for instance, "I did this

⁴ This term refers to an intelligence framework supported by evidence to assist decision-making by COs including at the prioritisation or triaging process.

because the unlawful person is causing most harm (based on evidence, data and analytics)”.

- j) The culture of consultation between management and COs is strong. The quality controls and management oversight does not appear to be sustainable and are not consistent between regional offices (due mainly to the need to work within differing resource or geographical constraints). While managers and COs generally communicate well, managers are stretched given their number of direct reports and consistency in oversight of actions by COs therefore presents possible risk. Pressure of workload and circumstances create exceptions to good consultation (e.g. Ms L).
- k) The process for escalation of matters of public interest to National Office, whilst improved, requires further refinement. There may need to be further clarity as to whether the CO can take steps whilst awaiting feedback from National Office and what circumstances that would be appropriate.

3. Appropriateness of INZ Compliance SOPs

- a) The current SOPs are detailed, technical, and helpful for lawful decision-making by COs (the “can I” referred to above). They are not necessarily extensively used by COs or helpful for the “should I” component of the role. I note that it is unlikely that any particular form of SOP will prevent isolated errors like Ms L.
- b) The current version is likely to be more useful in early stages and as training material rather than informing day to day activities.
- c) The proposed SOPs align with the principle-based SOPs which are favoured by most interviewed. Principle-based SOPs are more consistent with the scheme of the Act. Improved training and supervision would be more effective than overly prescriptive SOPs.
- d) Detailed comments are provided in the report regarding the SOPs. An expert review of the full proposed SOPs and guidance as to the completion of them would be prudent.

4. Whether there are organisational values or beliefs that are barriers to consistent and appropriate risk-based decisions and/or practices

- a) Other than as discussed below, organisational values or beliefs do not provide barriers to consistent and appropriate risk-based decisions or practices.
- b) Other than clarity of prioritisation, the primary challenge for Compliance is balancing the need to respond to immediate situations presented (e.g. where there is an opportunity to effect deportation of an individual in contact with Police or another agency) against the need to align activities with the priorities of the Compliance function.
- c) In addition, there is a natural gravitation towards operational activity when compared to less dramatic and less intrusive options. For example, the opportunity to plan and execute an operation where unlawful persons are likely to be located can be a more attractive option than other compliance activity.

- d) Once an operational activity has been planned and is executed, it is probable that deportation of those located will follow. It is unusual (in our view) for an unlawful person located not to be detained or to have some restriction placed on them. This is understandable. The Record of Personal Circumstance Interview (**RoPC**) does, however, change the course of some cases.

Recommendations

1. INZ Leadership implement a system whereby cases are prioritised according to those posing the risk of greatest harm to New Zealand. Existing priorities should be updated or replaced so that decisions are better aligned to the purpose and strategy of INZ. The focus should be on a risk-based priority system based on sound intelligence and supported by processes to minimise distracting influences (lower priority cases).
2. INZ encourage a broader range of compliance activities, including the funding, training, technical and administrative resources for the lower level compliance options. This includes better ongoing training and more ability for managerial supervision (current span of control is overly wide).
3. INZ obtains expert advice on the SOPs as to their appropriateness and suitability. Expert advice is to be obtained to ensure that any new SOPs specifically reflect the new prioritisation system and any changes in operational approach (including supervision and managerial approval).
4. INZ continues to consider opportunities for voluntary compliance with appropriate intelligence, training, and administrative support to achieve this.⁵

Prioritisation of deportation

The Compliance function within CRIS and INZ involves complex and difficult decision-making as to whether and how a specific individual should be removed from New Zealand. Inevitably, there is information asymmetry (individual vs INZ) and strongly differing views as to whether certain individuals ought to be removed. Principled, lawful and reasonable decision-making is the goal and (in the main) appears to be the practice. The prioritisation of limited compliance resource is a key issue for INZ.

Deportation priorities are not found in the SOPs. COs and Managers must prioritise caseloads given limited resources to deport all persons currently liable for deportation, for example, resources allow for a range of 500-700 compulsory deportations a year. **6(c)**

[REDACTED] ⁶ As can be seen below, INZ was responsible for almost 3,000 persons whose departure was managed by INZ either through deportation or managed voluntary departure.

⁵ This is intended to mean that INZ consider developing other levers for compliance officers to encourage compliance.

⁶ The estimated number of unlawful persons in New Zealand as at December 2016 is in the range of 10,433 to 11,355 (OIA response of 20 October 2017).

Persons to be prioritised for deportation, based on a [6(c)] [REDACTED], corresponds to certain groups in which an unlawful person may be classed (Appendix 3).⁷

The INZ Compliance function has limited discretion with certain categories of individuals. The highest in priority to deport being those who are liable for deportation either because they are a threat to national security [6(c)]; are about to be released from prison [6(c)]; or have come to the attention of Police for criminal conduct [6(c)].

In practice, COs see less discretion in [6(c)] cases, which is reflected in the statistics below. These include those people who have exhausted their pathways to remain in New Zealand. They have no avenues of appeal [6(c)] or have been determined to be a non-genuine refugee [6(c)].

The remaining priorities are distinct and where COs have the greatest discretion as a matter of practice. The categories are:

- [6(c)]
i [REDACTED]

Statistics from the last four years of INZ's deportation activities show compulsory deportations have been relatively stable.⁸ Comments on the numbers are as follows:

- a) The increased number of voluntary departures in 2017/18 seems to indicate that where there is greater emphasis by COs on activity which encourages voluntary departures, this has a net benefit for INZ, seen in the reduced costs per departure.
- b) A breakdown based on the case priority type, which largely parallels the prioritisation list [6(c)] [REDACTED], shows that a majority of cases fall within the categories where there is less discretion in practice [6(c)].
- c) There is still a large number of general deportations which appears to show that lower priority cases are being treated with the most intrusive response.

⁷ This list can be found on an internal drive in compliance forms and templates, as well as being reinforced by instructions from the INZ leadership team or compliance managers. CRIS, Compliance detention expectations email and Sensitive Issues Process email.

⁸ INZ Statistics – refer to page 9 below.

	2014/15	2015/16	2016/17	2017/18
Deportation	523	529	727	642
Voluntary Departure	1,242	1,354	1,437	2,304
Removals Cost Centre Costs	\$1,325,551	\$1,503,505	\$1,729,112	\$1,547,795

Deportations Across 6(c) and Deported Year			
Case Priority Type	Financial Year		
	2015/16	2016/17	2017/18
Criminality	243	281	255
Unsuccessful Appeal Decision	128	116	94
Referred by New Zealand Police	4	6	3
Burden on Government Services	4	3	4
General Deportation	161	332	286
Totals	540	738	642

Voluntary Departures Across 6(c) and Departure Year			
Case Priority Type	Financial Year		
	2015/16	2016/17	2017/18
Criminality	163	211	313
Unsuccessful Appeal Decision	269	180	283
Referred by New Zealand Police	4	2	7
Burden on Government Services	15	17	22
General Deportation	907	1025	1679
Totals	1358	1435	2304

Individual Cases

I investigated and make findings on the COs compliance with the SOPs in each of the following cases. I have also considered the independent INZ Assurance Review conducted internally on the Middleton and Ms L cases.⁹

Mr Middleton

Mr Middleton had previously been reported in the media due to being murder victim Karla Cardno's stepfather.¹⁰ He has subsequently been in the media regarding this incident, most notably, for making threatening statements (and being convicted of this). In MBIE's AMS Case Manager Software System (**AMS**), Middleton therefore had a criminal history.

Mr Middleton appeared on a list of historical unlawful persons located in the Wellington area. On 7 September 2017, the CO gathered further information via AMS. The records showed that Mr Middleton had been unlawful since 23 November 1986, having entered New Zealand on a visitor's visa from Fiji. In addition, AMS recorded Middleton had enquired into his travel documents in 2008 and INZ had duly responded. No further contact by Middleton was recorded.

Given the contemporaneous knowledge of the CO, the criminal offence record and Mr Middleton's long-term unlawfulness, Middleton was considered a high priority. The CO was aware of Mr Middleton's profile and the Compliance Manager tasked another officer to conduct further background checks. Further information requests to various MBIE divisions revealed that Mr Middleton had been employed by a training institute in Wellington.

Acting on this information, the CO then completed a Critical Risk Assessment for a visit to inquire with Mr Middleton at his workplace. The site plan was completed for the workplace premises and was approved by the manager on the 9th April 2018. The CO emailed information through to the Senior Advisor to General Manager of CR S pursuant to the escalation process then in existence.

On 10 April 2018, two COs were accompanied by police officers to the employer's work address. The employer informed the COs that Mr Middleton was teaching off-site. The lead CO then called the manager to get verbal permission to visit this different address. Once there, the employer requested that he ask Mr Middleton to remove himself from the classroom to avoid any distractions with the students.

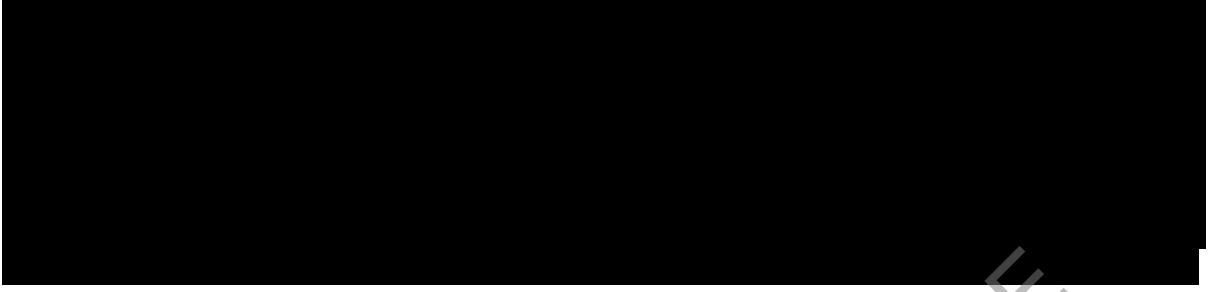
Mr Middleton came out to the street where the CO was, and the Police Officers and the cover CO kept a distance so as not to aggravate him. When questioned by the CO, Mr Middleton told him that he had been in New Zealand since he was four years old and that he thought he was a New Zealand citizen. The weather on this day was particularly inclement, so the CO decided to detain Mr Middleton to speak with him further at the Wellington Police Station.

At the time of detaining Mr Middleton, on the information available to him, the CO thought Mr Middleton had entered New Zealand sometime in his thirties and had not made meaningful, if any, attempts to regularise his status.

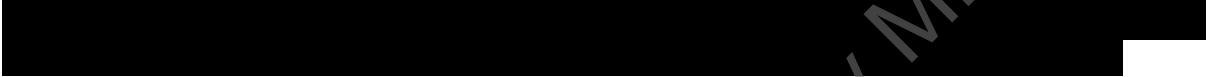
⁹ INZ Assurance Review, Deportation Processes and Managing Sensitive Issues, dated 7 June 2018.

¹⁰ A schoolgirl who was the victim in a high-profile murder case in Wellington in 1989.

At 12:30pm, Mr Middleton was transported to custody. The lead CO allowed Mr Middleton to call his lawyer, Mr Jefferies, but advised him that this was not a private area. 9(2)(a)



The CO sought to clarify Mr Middleton's citizenship status. At 1:55pm, the CO spoke again to the Department of Internal Affairs. 9(2)(a)



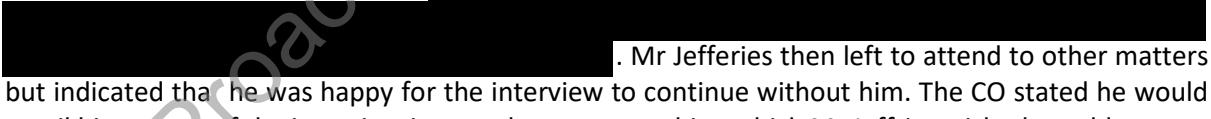
At 2:42pm, the CO resumed the interview and attempted the RoPC 9(2)(a)



The COs departed at 3:00pm and notified Mr Jefferies of a 10:00am appointment the next day. Mr Middleton remained in Police custody.

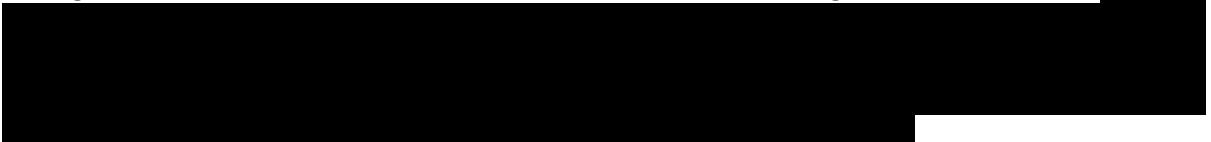
On 11 April 2018, Mr Jefferies, having other commitments, advised the CO that he would be unavailable to meet with them for the interview until mid-day. At 12:48pm, Mr Jefferies requested a physical copy of the original deportation order which the CO did not have on hand. The CO asked the reason for this as he had emailed Mr Jefferies an electronic copy the night before; Mr Jefferies explained that he was going to contact the Minister about this.

At 12:54pm, the RoPC commenced. 9(2)(a)

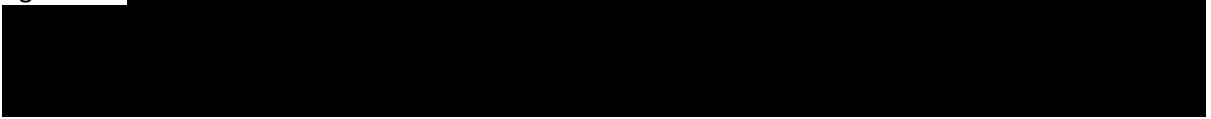


. Mr Jefferies then left to attend to other matters but indicated that he was happy for the interview to continue without him. The CO stated he would email him a copy of the interview in case there was anything which Mr Jeffries wished to add.

During the RoPC, it became clear to the CO that Middleton had strong ties to New Zealand. 9(2)(a)



The CO determined that there were at least four recorded instances of contact with New Zealand agencies. 9(2)(a)



9(2)(a)

At the termination of the interview at 2:54pm, the CO released Mr Middleton on a RRRA.

The CO gave Mr Middleton and his legal representative a further two weeks to provide further information. It was during this period that Mr Middleton or his family went to the Minister and the media reported the incident.

In the media, Mr Middleton stated:

"I got a call in the morning from the Lower Hutt Police Station asking me if I'd go in, and I said 'yip not a problem' ... I said I'll pop down and be in the police station at 4 o'clock...But anyway they turned up at my work and got me out on the pavement and arrested me and took me down to Wellington Central and you know took a few of my things off me, my belt and my shoes, and chucked me in a cold cell for a couple of days."

Mr Middleton said the police had treated him with hostility, telling him they had no records of him pre-1986, and that he had sneaked into the country.¹¹

Mr Middleton described the incident with INZ and the COs as "very, very hostile"; "It was bloody cold for a couple of days, it's quite dehumanising actually".

He said that if he was kicked out of the country it would destroy his family as he was the sole breadwinner; "I've got kids here, my family...and we face the whole parole thing year after year after year..."¹²

He is quoted as saying "The most annoying thing is that no-one bothered phoning my family. I asked them but no-one did."¹³

Mr Middleton's accounts of the events differ significantly from the information I received:

- The COs did not treat Mr Middleton with hostility; the reverse appears true, in particular from recordings of Mr Middleton's reaction to the CO on the second day.
- Mr Middleton was detained overnight.
- The claim by Mr Middleton that no-one bothered to call his family is puzzling given Mr Middleton was able to make calls to his lawyer and his brother.

Custodial detention of Mr Middleton was exercised overnight while the CO attempted to verify Mr Middleton's immigration history. Mr Middleton did inform the COs of the consequences if he were to be deported to the United Kingdom. Removal of items which could potentially be harmful occurred which is standard processing when potential unlawful persons are detained in custody.

On 20 April 2018, Mr Middleton was granted a permanent residence visa from the Minister.¹⁴

¹¹ "They chucked me in a cold cell for a couple of days", *Radio NZ* (16 April 2018) <<https://www.radionz.co.nz/news/national/355242/they-chucked-me-in-a-cold-cell-for-a-couple-of-days>>.

¹² Belinda Feek, 'Stepfather of murder victim Karla Cardno kept in cell and issued deportation notice', *NZ Herald*, (15 April 2018) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12031753>.

¹³ <https://www.stuff.co.nz/national/103117942/stepfather-of-murdered-schoolgirl-ordered-to-leave-the-country>

¹⁴ Lucy Bennett, 'Immigration backdown: Karla Cardno's stepfather Mark Middleton will not be deported', *New Zealand Herald* (20 April 2018) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12036391>.

Compliance with the Act and INZ SOPs

The level of management oversight and quality-control was adequate and consistently applied in this case. The CO conducted the investigations process lawfully and decisions were within the COs decision-making powers.

Mr Middleton's case raises the following issues:

- (i) INZ did not have the necessary information on hand for the CO to verify the information asserted by Mr Middleton (for example as to when he first arrived in New Zealand).
- (ii) A lack of accurate information (from Mr Middleton and with INZ) contributed to the decision to detain Mr Middleton rather than releasing him at an earlier opportunity or not prioritising his case.
- (iii) A lack of guidance in SOPs on how to proceed with such historical unlawful persons (at least 30 years and possibly much more).

It is accepted that an interview could not occur at Mr Middleton's workplace and that therefore the CO detained Mr Middleton to conduct the RoPC interview.

But at any point afterwards, the CO could have determined that detention was unnecessary, in which case it was then open for Mr Middleton to return home and to monitor Mr Middleton's progress with regularising his status by his request for a visa under section 61 (provided no deportation order had been served).

Otherwise, an appropriate time to have released Mr Middleton on RRRA conditions was after the attempted RoPC interview. There does not appear to be a compelling reason for detaining Mr Middleton overnight - despite section 313 allowing immigration officers to do so.

It is clear in the SOPs that RRAs can, or should, be given in Mr Middleton's circumstances. The CO was aware of Mr Middleton's background (his media profile, his employment, and his family ties in New Zealand). This might have raised to the CO that Mr Middleton was not a flight risk. With the benefit of hindsight and the additional information, detention was unnecessary. There is a question here, as with other cases, as to the weight given to whether Mr Middleton was able to afford to legitimise his status.

The email sent to the National Office by the CO stated that compliance action is to take place the following morning through a visit to the employer. The email indicated the likelihood of media interest and concluded "this email is for your notification." The reply from National Office was that the Communications team would be alerted in case there were any media inquiries (as there were).

In summary, Mr Middleton's case resulted from incomplete information held by INZ to verify Middleton's immigration history in time for him to be released at an earlier occasion. The electronic file gave rise to the suggestion that he had come to NZ in his 30s, which combined with working unlawfully and not having made any attempt to regularise his status, Mr Middleton presented as a priority for deportation.

Mr Middleton was unable to get timely and reliable information to the CO, all of which meant the CO did not have accurate information upon which to make a critical decision. It was an example where in hindsight detention should have been avoided.

Ms L

On 9(2)(a) made a complaint to the Police of a 9(2)(a). She was then taken into custody by Police after her unlawful status was confirmed by the CO, who as the duty officer, then gave instructions to Police to detain her. INZ held information that Ms L did not have any immediate family members in New Zealand and anonymous information in AMS suggested she was 9(2)(a)

Ms L was detained under s 313. When deciding whether to detain Ms L, the CO considered her to be a potential flight risk. Ms L had been unlawfully residing in New Zealand for the past four years without regularising her status. The CO did not believe that Ms L would depart New Zealand voluntarily if given the opportunity. That was a reasonable conclusion at that point.

Ms L requested legal representation, so the CO suspended the RoPC to allow her to obtain a lawyer. The CO proceeded to organise flights and her travel documents for her deportation on 9(2)(a).

On 9(2)(a), the CO returned to interview Ms L but no lawyer was secured. When it became clear to the CO that English was a second language, he obtained an interpreter and conducted the interview in full again.

Ms L told the CO that she did not want to leave New Zealand

The CO noted that Ms L had a partner but could not determine if it was genuine as the information provided about the relationship was vague. There was therefore no identifiable family unit to protect under New Zealand's international obligations.

The CO noted that Ms L said, "I had an interview with the Police which led me to the position I am in". There was no other reference to the circumstances of the complaint and Ms L did not provide further context to be recorded by the CO. There was no explicit policy which required that an unlawful person who was a complainant of crime remain in New Zealand while an investigation proceeded. Police affirmed that Ms L was not required to remain in New Zealand. Nor was there a policy to note down circumstances which the unlawful person did not wish to be have recorded.

Although there was an alert on AMS that she had complained 9(2)(a) this was not communicated to the Manager. The Manager assumed that the interview with the Police (based on the statement recorded above on the RoPC form) was on more orthodox matters (i.e. she may have been arrested by Police). Without this knowledge, the Manager assumed there was nothing unusual about the case. The CO did not discuss any potential sensitive issues with another colleague, which was a regular feature of the team, and could have raised to his attention to alternative methods of managing Ms L's case.

The CO did email to his manager earlier on 9(2)(a) regarding Ms L's DO and other documentation but did not respond to emails which related to Ms L's case which highlighted sensitive issues. One email came from Ms L's sister-in-law on the 9(2)(a) at 8:15pm where she stated the circumstances which Ms L complained to the Police. There was also another email on 9(2)(a) from a family member of Ms L to the CO providing further information and assistance or accommodation for Ms L at 1:16pm. The CO recalled this email but did not respond.

On 9(2)(a), Ms L's sister-in-law emailed again and mentioned that "Ms L was not informed of the decision to deport, neither were the family members" as well as an allegation that "she was left

in the Police cell for two more days". The CO understood that Ms L was informed of her impending deportation on this day by Police.

The CO recalled a telephone call with Ms L's sister-in-law that evening where it was clear to him that the family wished to "go to the media". Although this was raised to his manager, the information flows were inadequate. This in turn impacted on management ability to identify the risk.

9(2)(a) was deported to 9(2) at 9:25am.

Compliance with the Act and INZ SOPs

The CO conducted the investigations process lawfully and decisions were within the COs decision-making powers.

Ms L's case demonstrates:

- (i) It was open to the compliance officer to consider alternatives to detention and to seek further guidance with his supervisor regarding these options. He did not do so in this case which is regrettable;
- (ii) There appears to be inadequate training on when to identify a sensitive issue such as when unlawful persons are victims of crime;
- (iii) There was a lack of adequate communication with more senior colleagues, the manager or with National Office;
- (iv) The CO did not recognise the sensitivity of the issue, or discuss with others for a second opinion;
- (v) The CO did not have regard to information coming from other sources (i.e. extended family of Ms L) which would have raised to his attention the sensitive issues.
- (vi) In short, information flows were inadequate: there was an incomplete RoPC record and subsequent management oversight. It should be noted, however, that this was only the second occasion that the CO was performing the "on-duty" role, he was relatively inexperienced (just over 12 months in the role) and it happened to be a busy week that required him to juggle a number of competing priorities.

The SOP on risk could have encompassed Ms L's situation under the risk of media interest, the risk to INZ reputationally or politically. These could be framed as question prompts so that the CO was alerted to thinking, "what might the public perception be if INZ deported a potential victim of serious crime?"

The decision to prioritise Ms L's case for deportation appears inconsistent with the prioritisation list. To decide to investigate may have been better guided if the CO were to ask, "what harm does Ms L present to the public to be a priority to deport"? Ms L presented as either a 9(2) (the lowest in priority to deport) or a 9(2) (wilfully non-compliant). There was no discussion with the manager as to her priority or risk factors.

Whilst lawful, the decision to detain Ms L did not accord with the consideration and care which I have observed usually exercised by COs. It is accepted that the CO felt Ms L was a flight risk. However, when it became clear that Ms L required an interpreter (and therefore suggested that she may not be a good communicator to him because of English ability), the CO could have been more vigilant in ascertaining further information.

In addition to the factors identified in the internal INZ Assurance Review, the CO recalled receiving emails from family members of Ms L but did not reply. These emails highlighted that Ms L would not be a flight risk and offered to arrange for Ms L's departure. Detaining Ms L therefore appeared unnecessary.

It appears this is a case where the CO made lawful decisions but did not apply discretion in Ms L's circumstances. However, there is minimal training on discretionary judgment and risk-based decision-making within the SOPs.

The CO did not view Ms L's circumstances as sensitive and therefore did not escalate the case fully. When the CO raised this case to his manager, his manager was acting on the information which was incomplete. The manager was unaware of Ms L's circumstances.

The factors that the CO took into account in deciding not to release Ms L were:

- (i) the length of time Ms L had been unlawful in New Zealand;
- (ii) Ms L had made no attempt to regularise her immigration status during this period;
- (iii) Ms L stated during her RoPC that she did not wish to depart New Zealand;
- (iv) Ms L did not need to remain in New Zealand for any investigation to proceed;
- (v) the anonymous tip-off seen on AMS; and
- (vi) that it was lawful to deport Ms L.

The CO explained that although Ms L was not a high priority to deport, and there was an offer from extended family members to arrange for her departure, the CO was not persuaded. Reassurances came from Ms L's sister-in-law whom the CO knew had supported Ms L financially to remain in New Zealand unlawfully. Given the Police did not require Ms L to remain in New Zealand while investigations progressed, the CO was of the view that she could be deported.

Given the CO was balancing duty officer and existing duties, greater management oversight and support could have been provided. In summary, this decision appeared to have resulted from inexperienced individual judgment and a lack of adequate information supplied to the manager. The Manager did not ask for details and there was no trigger to do so in the RoPC she reviewed. There was a lack of experience, guidance and training on escalating cases of this kind. It did not occur to the CO that where an unlawful person may be the complainant of a serious crime, he or she needed to be treated sensitively.

Sample Cases

A sample of 12 cases (not statistically representative) from the Hamilton, Auckland, Wellington and the Christchurch office were randomly selected. Each case was a non-custodial deportation. The sample is limited for the purpose of checking the general INZ processes across New Zealand and to get an impression of whether COs are adhering to INZ policies and SOPs.

Hamilton

(1) HAM011

Two citizens of India became unlawful in New Zealand on 15 September 2017 when their attempts to obtain further visitors visas were declined. When the CO received an anonymous tip that they resided at an address without valid visas, he sought further information from the Housing and Tenancy Services division in MBIE. Further information did not match, so the CO sent a DO to this new address on 2 November 2017. These were returned unopened.

The CO prioritised these citizens for deportation because he received an off-shore AMS Alert from the Mumbai office in relation to suspected fraud. There had been concern in the Bay of Plenty area of a large number of unlawful persons from India with declined visas or who were breaching visa conditions by working in sectors such as in agriculture or horticulture industries. The CO explained the wider economic harm being caused and difficulties in tracking such unlawful persons.

On 9 January 2018, the CO completed a Critical Risk Assessment which was approved by the manager. The site visit was conducted the next day at 8:46pm. The CO was accompanied by Police Officers and was soon aware that the unlawful persons had noticed their presence. The CO spoke to a tenant at this address at the front door who denied knowledge of the unlawful persons. However, one of the Constables was positioned at the back of the property and prevented the unlawful persons from escaping. When it was clear to the CO that they did not speak English well, another occupant of the property aided with interpretation. At 8:48pm, the unlawful persons were detained. As they were transported to Tauranga Police Station, the CO called for an interpreter. The CO served the DO back at the police station.

On 11 January 2018, the CO completed a RoPC with an interpreter. At this interview, both stated that they wished to return to India. This concluded the interview, but the CO sought a Warrant of Commitment on the same day due to the additional time required in arranging travel documentation and flights.

On 19 January 2018, the unlawful persons were deported to India.

(2) HAM002

A citizen of India became unlawful in New Zealand on 2 September 2014 when the institute in which the individual had been studying on a student visa, refused to admit him due to his failure rates. He had been working part-time while studying. The CO had become aware of this individual since August 2016 when he was located at an address in Rotorua. Information was emailed from a colleague indicating the unlawful person's new address in Rotorua.

The CO prioritised this individual because of concerns with the individual's temporary partnership-based visa application. In the view and experience of the CO, the timing suggested this was a marriage of convenience and could have resulted from the exploitation of a young disadvantaged female.

On 21 May 2018, the CO conducted a site visit. The CO located the unlawful persons and served him with a Deportation Order. The unlawful persons were detained at 7:51pm (given the operations curfew of 9:00pm). The CO made the decision to handcuff the individual as there was passive resistance but later completed a Use of Force Report where no harm was reported.

The following day, the CO updated the manager, and proceeded to conduct a RoPC. Due to other involvements, the interview was conducted by another officer but was approved by the CO in charge after review.

At the interview, individual stated that he did not wish to speak to a lawyer, he did not know where he would go if he was deported. He had been living in New Zealand for the past 7 years on his student visa and that he was married to a New Zealand citizen but had told her that he was in New Zealand unlawfully. However, he could not tell the CO where she was, and they had not been living together since November 2017. The CO considered no international obligations were triggered as the individual had no children with his alleged partner and no genuine contact with the partner.

The CO then went back to the Research branch in Wellington to check whether there were any circumstances which might prevent deportation to India. When it was reported there was none, the CO sought a Warrant of Commitment to extend the detention. In his view and experience, travel documentation and flights to India would take more time than the 96 hours allowed under s 313 and there was a real flight risk given his initial resistance.

On 1 June 2018, the unlawful person was deported to India.

(3) HAM017

Two citizens of India became unlawful in May and October 2016, respectively. One had been on a student visa which expired and the other on a visitor visa when a further attempt at extending this visa was declined.

On 22 April 2018, these two unlawful persons were stopped by Police in their vehicle and identified. Police confirmed with the CO they were unlawfully residing in New Zealand and the CO then gave instructions to detain them in custody. The CO was of the view that they were a flight risk given they had previously declined applications and no pathway to residency. In the CO's view, they were aware they would be required to depart or be deported when found by INZ. There was no information available which revealed ties to family in New Zealand.

The CO prioritised both individuals because in his view and experience, they presented a larger part of the regional strategy to ensure that unlawful persons did not contribute to the economic harm of the region. There was concern in the Bay of Plenty area where INZ was experiencing large numbers of unlawful citizens with declined visas who were breaching visa conditions by working in sectors such as agriculture or horticulture industries.¹⁵ One had been working while the other was actively seeking work in these sectors when they came to the CO's attention.

On 23 April 2018, at the RoPC both advised they wished to return home and this concluded the interview. Arranging travel documentation and flights to India delayed the CO so a warrant of

¹⁵ As with case HAM011 above.

commitment was sought and granted until 20 April 2018. The delay in deportation was attributed to arranging travel logistics as well as travel documentation: one of the individual's passports was located at INZ in Manakau so needed to be couriered to Tauranga and there was further delay arranging for escorts to transfer both unlawful persons to Auckland International Airport. This meant a further warrant of commitment was applied for until 22 May 2018.

On 1 May 2018, the unlawful persons were deported to India.

(4) HAM018

A citizen of China had been unlawfully in New Zealand since 1 July 2017 after his second visitor visa was declined. The individual applied under section 61 for a special request but this was refused on 5 September 2017.

The unlawful person came to the CO's attention via an external agency conducting a labour inspection where the individual had been employed unlawfully. When the CO was doing his background checks into the individual's identity, an AMS Alert for possible fraud increased this individual's priority for deportation.

On 16 May 2018, the CO then conducted a Critical Risk Assessment which included an escalation notification to the National Office. This was completed because of the risk of detaining him in a workplace and any possible media interest. This Site Plan was approved by his manager.

On 21 May 2018, the unlawful person was detained and served a DO. The CO established his identity, then commenced the RoPC. The individual stated he wished to return to China, so this concluded the interview. No international obligations were identified. Although the individual had a valid passport and did not require escorts, a Warrant of Commitment was sought and granted on the 24 May 2018 because there were delays in arranging an escort and flights.

On 6 June 2018, the unlawful person was deported to China.

Auckland

(5) AK014

On 7 January 2018, a citizen of Tonga came to the attention of the CO who was on duty when the Police called the Immigration Call Centre to inquire into his immigration status. The CO decided after looking at AMS that this individual was a P3 priority to deport. The Police gave the person a verbal warning for common assault, the circumstances in which did not warrant an investigation, and informed the CO that they were not going to proceed with charges. The Police, upon becoming aware this individual was an unlawful citizen from Tonga, awaited the CO's decision regarding whether to detain him.

Although the CO considered the possibility of RRRA, he did not think it was appropriate. The main reason was that the unlawful person had no ties in New Zealand and therefore presented as a flight risk. The secondary reason to detain was in order for the CO to interview the unlawful person the next day. The CO explained that this was because of the additional costs to the taxpayer for the CO to travel on-site to conduct the RoPC as the duty call occurred during the weekend.

On 8 January 2018, the CO met with the individual, completed the Statement of Identity and served him with a DO. At the RoPC, he indicated that he wished to return to Tonga, so the interview was concluded. This interview was not approved by the manager but the CO checked the individual did not have any outstanding appeals.

On 10 January 2018, the individual was deported to Tonga.

(6) AKL019

An investigation was launched into a construction company allegedly hiring unlawful persons. A Critical Risk Assessment had been conducted and a team of COs deployed for the field operation.

On 20 March 2018 at 7:28am, the COs intercepted a van registered to the construction company. The CO then called out the suspected unlawful person's name. She responded whilst in the van dressed in construction gear. When she was identified, the CO called additional immigration officers. Five arrived including a relieving Operations Manager to handle other individuals in the van.

The CO conducted background checks and had found that she had previously been served a DO and a Deportation Liability Notice in 2014. The CO previously in charge of her file had attempted to contact her again to no avail.

The unlawful person was then transported to the Auckland Police Custody Unit. She was provided with a phone to contact her partner. The CO was taken into custody as she had been given the opportunity to depart voluntarily and did not, as well as her long-term unlawfulness, this made her a priority to deport.

On 21 March 2018, the CO returned with an interpreter to conduct the RoPC interview. She indicated that she wished to return to Samoa and to speak with her Immigration Adviser. The CO allowed her to phone the named Immigration Adviser. However, the Adviser told her that the individual was not a client.

The CO was aware of her family ties to New Zealand, as the unlawful person had previously submitted two section 61 visa requests. Through the RoPC, it became clear that she had a relationship with the two children of her partner. One was no longer a minor and did not live at home. However, another was 9(2)(a) [REDACTED]. The CO asked about her relationship with this child. The individual explained that 9(2)(a) [REDACTED]

Because there were intentions to prosecute the employer the CO interviewed the partner to obtain more information about the individual's employment. The CO also wanted to understand the impact and any effects deporting her might have on him and his family. The CO was concerned that the marriage was not genuine given its timing and held that the partnership visa (if applicable) could be tested off-shore. The partner stated the family could move to Samoa and there were employment prospects there for their family.

The CO received a call from a local MP office's branch regarding the individual. The CO was informed that the Associate Minister agreed to consider her visa request once she was off-shore so the CO emailed through a background of the case.

On 22 March 2018, the individual was deported to Tonga.

(7) AKL001

On 18 February 2018, a citizen of Samoa came to the attention of Police when stopped as a result of a careless driving incident. She was taken into custody by Police in relation to this incident. The interaction with the Police and the fact she had become unlawful since mid-2008 increased the CO's prioritisation to deport her.

The following day, the CO discussed her case with her manager and decided to release her on a RRRA. The CO believed that the unlawful person would depart voluntarily as agreed. The CO gave her two weeks to arrange flights to depart, which she believed was a more humanitarian approach to deportation.

During this time, the CO received a phone call from a friend of the unlawful person regarding a process of Māori adoption as a pathway to citizenship. The CO explained this was not a legitimate pathway.

On 2 March 2018 the individual departed for Samoa voluntarily. The CO explained she did not conduct a RoPC interview with the individual because she departed before it could be undertaken.

(8) AKL003

Operation Spectrum aimed to uncover companies exploiting unlawful migrants for labour in poor working conditions.

On 31 May 2017, an investigation into a painting company as part of Operation Spectrum revealed that an Indonesian citizen had been unlawful since 7 July 2015. Although another unlawful person was the target of the operations, and he was subsequently identified and detained.

A routine self-search was conducted but did not reveal any harmful objects in his possession. The individual was then taken to the Auckland Central Police Station where an identity statement, DO and RoPC was conducted with the aid of an interpreter. The individual said he wished to return to Indonesia and the RoPC concluded. No international obligations were triggered. Because of Operation Spectrum, the individual was further questioned in relation to their employment.

The CO prioritised this individual to deport as AMS alerted to a previous character warning. The CO held that there were unlikely to be any available pathways into residency.

On 3 June 2017, the individual was deported to Indonesia.

Wellington

(9) WGT007

On 21 March 2018, a field operation was conducted to find an unlawful person working in the Bay of Plenty area. The Critical Risk Assessment was conducted and approved by the manager.

This citizen of India, previously on a student visa, had become unlawful in December 2017. He was found at this address in Tauranga along with three other males who had visa applications pending. The unlawful person was then taken into Tauranga Police Station and served a DO. The individual requested that he be able to take some personal belongings including some cash.

This individual had a previously requested and declined section 61 visa on 23 February 2018. Given his pathway to residency was exhausted and the individual had been wilfully non-compliant, the CO prioritised deportation.

The RoPC was conducted the next day. He did not request a lawyer and indicated that he wished to return. On the same day a Warrant of Commitment was applied for given the time required to arrange travel and flights. Individuals who are being deported must be escorted to the departing hub regardless of whether they are custodial or non-custodial detentions.¹⁶

On 29 March 2018, the individual was deported to New Delhi, India.

(10) WGT002

This citizen of the Netherlands had been unlawful since 20 April 2017. The CO was alerted that he had applied for a work visa but this was declined. A Critical Risk Assessment was completed and approved by the manager.

On 13 December 2017, the CO along with two other officers called into his workplace where the unlawful person was detained for the RoPC interview. He indicated that he wished to return home. Given his case did not trigger any international obligations, the CO decided to release the individual on a RRRA as he agreed to depart voluntarily, and it was unlikely given his employment history that he was a flight risk. The individual sent through his flight details as agreed.

On 27 December 2017, the individual departed voluntarily to the Netherlands.

(11) WGT001

This citizen of China came to the attention of the CO through an anonymous tip-off in late 2017. The CO did relevant background checks on the individual.

Due to the end of the year and the low priority of this individual, the CO decided to suspend investigation until early 2018.

The individual had previously been on student visas and had resided in New Zealand for the past ten years. She had been unlawful since 30 June 2012, when her student visa expired and there were no further applications to renew. In 2012, INZ had sent her a letter regarding her immigration status but there was no follow up.

On 11 January 2018 the CO completed a Critical Risk Assessment which was approved by the manager. The plan was to reach her residential address at 7:00am prior to her departing for work.

On 16 January 2018, when the field operation occurred as planned, the individual was found at this updated address with her partner who she had been living with. Her passport was located, she was served with a DO and transported to Wellington Central Police Station. In the RoPC, the individual told the CO that she wished to return to China.

The CO considered the following factors relevant when deciding whether to release on conditions or detain until deportation:

- (vii) the time and resources already taken and required to locate the individual;

¹⁶ Immigration Act 2009, s 178.

- (viii) the CO had previously spoken to Phoenix Immigration about her case, but they replied that they did not recall the client nor were they acting for her;
- (ix) there are negative flow-on effects if the CO does not deport where others might similarly decide not to re-apply for student visas where they had been studying in New Zealand for a long time; and
- (x) there was a need to arrange to escort her from Wellington to Auckland so a RRRA was not an effective option where departure might occur within 96 hours.

On 18 January 2018 the individual was deported to China.

Christchurch

(12) CHC003

This citizen of the Philippines had been working illegally in Dunedin and there was a health assessment alert on the AMS system. Previous information checks and site visits were unsuccessful in finding this unlawful person. Further investigation of the individual's social media confirmed the individual's workplace.

On 19 March 2018, the individual was found, detained and served with a DO. During the individual's RoPC interview, the individual mentioned they wished to return, so the RoPC was concluded.

While the unlawful person was being transported to custody at Dunedin Central Police Station, the CO was made aware of the unlawful person's medical condition, 9(2)(a) [REDACTED], and the medication required. The CO retrieved the medication from his address and provided this to the Police.

The decision to deport was discussed with the manager and approved. Escalation notification to National Office was considered but was seen as unnecessary. The next day, the CO proceeded to organise the individual's deportation including locating passport, booking flights and organising an officer to escort the individual to the port of departure.

On 21 March 2018, the individual was deported to the Philippines.

Compliance within Sample Cases

Given the sample size of cases was small (due to time and resources available), conclusions based on them alone need to be treated with some caution.

The sample cases do not raise any issues with the legality of decision making. They appear orthodox and unremarkable and appropriate processes followed. There were examples of less coercive methods to facilitate departure. The sample cases support our conclusion that there is a good team culture within the INZ Compliance function. It is the norm to discuss and consult colleagues or managers.

The cases suggested that lower priority examples were selected for deportation (for the reasons explained above). Out of the 12 cases sampled, only two of those to be deported could clearly be

categorised as higher priority. From our interviews, COs appear to view Police Stops **6(c)** as higher priority than stated on the priority list (although the numbers recorded as **6(j)** do not bear that out). The concern of COs is that if they do not deport, and those individuals subsequently act in manner contrary to public interests, there is both a personal and reputational risk to INZ. There is a view that CO's should be deporting unlawful persons at the first available opportunity to avoid this risk. This is an understandable one.

COs are alive to the possibility of voluntary departures. After the RoPC or an interview was conducted in two out of the 12 sample cases, the CO negotiated a voluntary departure after releasing the individual on a RRRA. COs noted that this can only occur after COs are able to meet with unlawful persons to gain a first-hand impression of the potential unlawful person's character, including whether the unlawful persons could be trusted to depart voluntarily. In both cases, it was evident the CO encouraged the individual to depart and to seek other lawful pathways.

In the remaining 10 sample cases where voluntary departure did not occur, the question is raised as to whether some cases required detention and/or compulsory deportation. For instance, a less intrusive approach might include:

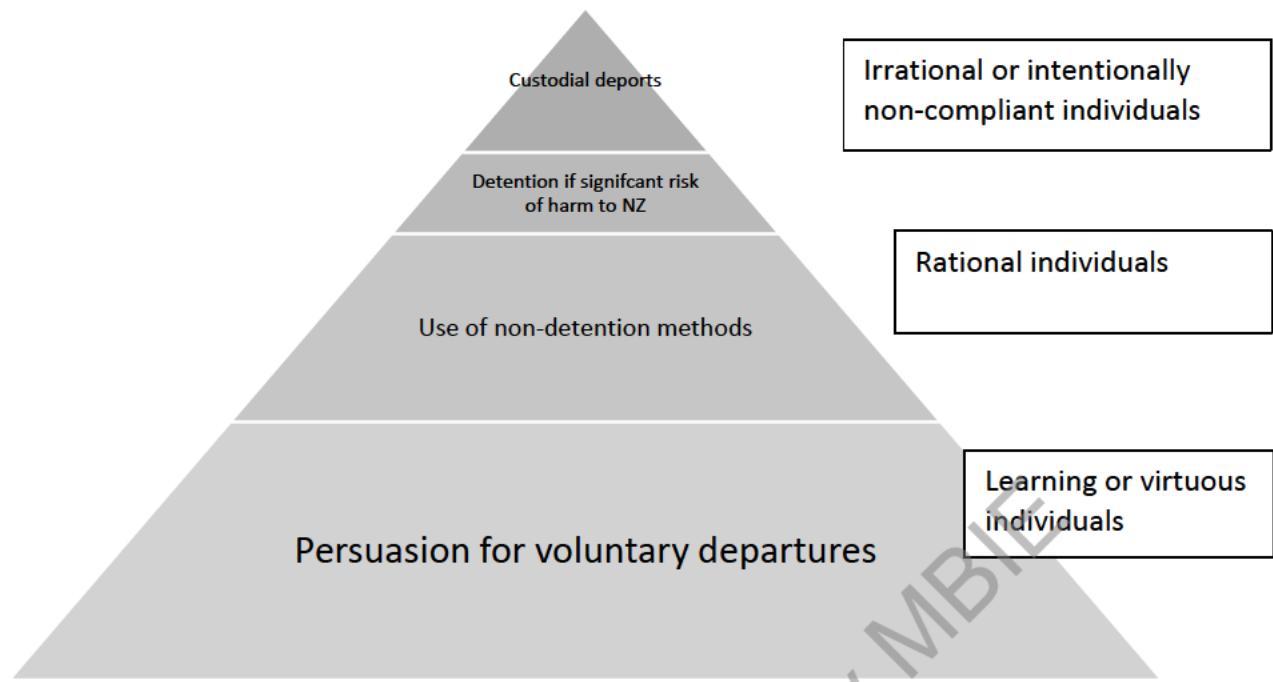
- (i) educating and persuading employers or sponsors;
- (ii) site visits to workplaces;
- (iii) greater communication with temporary visa holders who have only recently breached conditions or become unlawful;
- (iv) collaboration with other regulators and enforcement authorities; or
- (v) encouraging study institutions to provide greater education to student visa holders on consequences.

This may provide a better use of stretched resources given the lack of administrative and technical support to conduct custodial detentions or deportations.¹⁷

A responsive regulatory pyramid, adapted from the examples provided by John Braithwaite, might therefore be characterised as follows:¹⁸

¹⁷ Qualified by situations where unlawful persons do not have the financial ability to depart voluntarily.

¹⁸ The Commerce Commission's Enforcement Response Model is a New Zealand example of a regulatory pyramid contained in the Enforcement Response Guidelines. See <https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf>



The sample cases demonstrate that there is no uniform prioritisation system. In addition, there was a lack of guidance as to prioritisation in the aftermath of Mr Middleton and Ms L and increased uncertainty as to how COs should proceed.

There was a follow-up email which addressed the issue of the escalation process and further guidance on what might be the kinds of sensitive issues to raise. However, these two emails appeared not to provide the level of clarity that should be available. The INZ Assurance Review recommends further guidance for COs in this area and I agree.¹⁹

This includes guidance as to the relevance of family or children residing in New Zealand, long-term unlawful persons, potential risk of offending, costs to the health system or other services in New Zealand and other relevant matters. Further guidance must come from INZ on where the resources of CRIS are to be applied to meet the wider objectives of INZ.

Standard Operating Procedures

The SOPs govern the day to day activities of COs. They are currently focused on practical steps and actions to be taken.

The Terms of Reference for this review are that I specifically examine whether the SOPs are being followed and sufficiently robust to ensure that sound risk-based decisions are made.

Pending the outcome of this review, INZ are finalising new SOPs. I was provided with samples of the new SOPs to get an understanding of the changes which are likely to occur.²⁰ My focus on the findings in relation to the cases were on the current SOPs which total almost 800 pages in length.

¹⁹ INZ Assurance Review, Deportation Processes and Managing Sensitive Issues, dated 7 June 2018, at 6.

²⁰ Namely the drafts of SOP Stage One on the Preliminary investigation and SOP Stage Five on the Detention decision.

The proposed SOPs will operate to guide COs through eight key phases of the decision-making process, with twelve corresponding SOPs:

- (i) **Preliminary Investigation**
SOP-01: How do I determine whether the person of interest should be investigated further?
- (ii) **Establishment of Liability**
SOP-02: How do I determine applicable legislation?
- (iii) **Direction of Investigation**
SOP-03: How do I choose deportation method?
SOP-04: How do I determine and take appropriate 155-157 Liability for Cause investigative actions?
SOP-05: How do I manage self-deport outcome?
- (iv) **Locate and Serve**
SOP-06: How do I locate and serve?
SOP-07: How do I factor in Departmental Reviews or appeal decisions?
- (v) **Enforcement Action**
SOP-08: How do I undertake enforcement action-detention?
- (vi) **Information gathering**
SOP-09: How do I inform the enforcement outcome?
- (vii) **Decision Point**
SOP-10: How do I make and communicate my case decision?
SOP-11: How do I execute the travel and escort?
- (viii) **Feedback and review**
SOP-12: How do I finalise the deportation case?

There appears to be at least three key aspects of discretion in the CO role. Phases 1 to 3 deal with determining which cases are priority for further investigation and (if relevant) deportation. Phases 4 to 5 deal with determining whether a custodial option is appropriate for the particular individual (flight risk, safety risk, likelihood of voluntary departure etc). Phases 6 to 8 deal with determining whether to continue with deportation after personal circumstances are considered. These phases will be discussed in relation to whether the current, or proposed, SOPs equip INZ Compliance staff to make appropriate risk-based decisions.

Prioritisation to investigate or deport

There are a number of areas where the SOPs (existing and proposed) may be deficient in guiding COs to make sound risk based decisions in relation to prioritisation.

First, the prioritisation list does not explain the reasons behind the ranking system. The existing SOPs detail the steps in which deportation liability is determined but not the rationale behind prioritisation. The new SOPs improve slightly on this area in that there is express reference to priority investigations which are most likely to:²¹

- Prevent risk
- Protect the integrity of immigration system and its policies
- Safeguard against unreasonable cost or other burden being placed on the Government and economy
- Safeguard against risk to MBIE's reputation

However, risk is not defined and there is no prioritisation amongst different types of risk (e.g. risk of harm to the public, or the risk of burden to the government).

²¹ SOP-01 in draft, at 7, 'Priority and resource'.

Second, there is no policy to attempt less resource-intensive efforts to encourage voluntary departure from unlawful persons. For example, there is only two references at the steps when determining deportation liability in the SOPs under:

- (i) Step 5 (after identity, immigration status and other timeframe checks have been completed), in the SOPs where COs are asked to, “determine whether deportation is the best option. Discuss with your Technical Advisor or Immigration Manager if required”²²; and
- (ii) Step 6 guides COs that “[i]n some cases, it may be appropriate to discuss the situation with the client, and:
 - request them to depart voluntarily, or
 - ask them to regularise their status. See recommending a s 61 visa or Special Direction.”

If taking steps to facilitate their departure or regularisation, it is important that you discuss this with them, and set out clear expectations of the timeframes they must meet. Monitor the case. If the person fails to comply, or it is appropriate to proceed with deportation, go to step 7.”²³

There is a significant body of expertise around “responsive regulation” with a flexible and responsive choice of strategies which are conceptually arranged in a pyramid (as shown above). The more frequently used, cheaper strategies are first choice and are less coercive and less interventionist.²⁴

Under Best Practice, there is no prerogative for CO’s to urge voluntary departure or self-deportation. The SOPs provide only the parameters of when voluntary departures can occur:²⁵

If, at the date you are allocated the case...	Then...
the client may still depart voluntarily	advise the client about their options to depart voluntarily at their own cost. Use template letter Co2a. Specify the dates by which they must leave New Zealand and/or contact you.
the client may not depart voluntarily	advise the client about their options for non-custodial deportation at their own cost. Use template letters Co1 or Co2 to advise the client about their options. Specify a timeframe for them to take steps to depart or contact you.

Third, the existing SOPs do not provide adequate guidance on when COs might decide not to proceed with deportation. Reasons are provided for in the SOPs when COs decide not to proceed with deportation:²⁶

Good reason

Sections 155, 156 and 157 of the Act give the holder of a temporary or interim visa the opportunity to give good reason why they should not be deported.

²² SOPs, Deportation, Steps: Ensuring a client meets deportation criteria, at 206.

²³ Ibid.

²⁴ See generally, John Braithwaite, ‘Responsive Regulation’, at <<http://johnbraithwaite.com/responsive-regulation/>>; Keith Manch, ‘What does good regulatory decision-making look like?’ *NZ Policy Quarterly*, Vol. 13, Issue 2, 2017; Compliance Common Capability Programme (2011) Achieving Compliance: a guide for compliance agencies in New Zealand, Wellington: Compliance Common Capability Programme; David Bromell, ‘Creating public value in the policy advice role: a reflection from the front line’, *Policy Quarterly*, Vol. 8, Issue 4, 2012, at 16-22.

²⁵ SOPs, Steps: Voluntary Departures and self-deportations, at 140.

²⁶ SOPs, considering reasons provided for not proceeding with deportation, at 224.

The client can give INZ any reasons why they consider deportation should not proceed. Whether or not those reasons are ‘good’ reasons, is a matter for determination by an immigration officer.

Clients can give reasons verbally or in writing, however encourage the client to put their reasons in writing where possible. The date that reasons are given verbally to an immigration officer should be taken as the date of submission. If the client intends to give further reasons (written or verbal) after giving verbal reasons, give them a deadline by which to do so.

If the client does not give good reason, then they are obliged to leave New Zealand (subject to the completion of any humanitarian appeal to the Immigration Protection Tribunal).

If the client does give good reason, deportation liability should be cancelled under section 172 of the Immigration Act 2009.

If the client is made liable for deportation as a result of criminal offending, when considering cancelling deportation liability, immigration officers must have regard to any written submission made by a registered victim of such offending.

Guidance as to situations where deportation is inappropriate, such as Ms L situation ought to be provided either in an SOP or through supervision or training.

Fourth, the SOPs are prescriptive about the situations but do not provide guidance on discretionary decisions. For example, Step 9 provides two options (effectively to detain or not detain) but not the reasons to aid decision-making:²⁷

Step 9

If...	Then...
the person is to be detained	Continue with detention process. Go to Detention for up to four hours by an immigration officer .
the person is not to be detained	Discuss options for voluntary departure or self-deportation. Go to Voluntary departures and self-deportations

The current SOPs provide the procedure for discussing with managers if there is any doubt as to sensitive issues, particularly when planning fieldwork for investigations. Fieldwork presents risks to INZ but is a key part of the Compliance function, including to:

- investigate whether a client may be breaching the conditions of their visa
- locate clients who are liable for deportation or turnaround
- investigate offences against the Immigration Act or other criminal offending by individuals, employers, or other parties.

The SOPs advise that whilst details can be verified from the office, field work is a key aspect of the role and provides the opportunity to observe the unlawful person first hand or ask questions.²⁸ Again, where there does not appear to be particular guidance is on the balance between field work of a persuasive level (versus field work resulting in enforcement such as detention or deportation).

For any site visit relating to a client who is or may be as a result of investigations, liable for deportation, a Site Visit Plan²⁹ should be prepared and approved by the compliance manager. This can be approved by email, phone or by review of the Site Plan file by the manager.³⁰

²⁷ SOPs, Steps: Entry and Search of Premises, at 403 – 405.

²⁸ SOPs, Investigation, Planning and Conducting field work / operations, at 118.

²⁹ Also called Critical Risk - Offsite Activity Assessment & Approval.

³⁰ SOPs, Investigation, Planning and Conducting field work / operations, at 119.

The SOPs provide that:³¹

A Site Visit Plan should be prepared for any planned compliance activity and is expected for compliance visits where you may exercise the powers of entry and search of premises under section 286, and/or detention under section 312.

Based on the information gathered to complete the Site Visit Plan, you will reach a perception of the risk presented by the site visit (the perceived cumulative assessment). The factors considered will relate to both the client and the location of the visit.

Based on the perceived cumulative risk assessment, you will determine whether police resources are required to support the visit.

Both the officer and the immigration manager or technical advisor need to reach a common perception of the risk and be comfortable with the agreed plan for the site visit.

If an additional address of interest is identified while you are in the field, advise your immigration manager or technical advisor. You may proceed without completing a site visit plan for additional addresses visited.

Larger operations may be designed to locate a large number of unlawful clients, reconnoitre addresses of interest, or pay visits to specific employers or schools. Generally, a SMEAC (Situation, Mission, Execution, Administration, Command; a set of operational guidelines or orders) will be required in these circumstances. These must be approved by an immigration or Branch Manager.

On the Site Plan Visit forms, there is a risk indicator check-list which allows COs to detail the potential unlawful person's immigration history, previous interactions with INZ, any criminal history or health issues, an employer's address or details, or any other details which INZ possesses or which the CO was able to investigate from the office.

A similar comment as before applies to the prioritisation of the purpose behind a site visit.

Detention Powers and Release and Reporting

Compliance action includes the detaining of a potential unlawful person. The SOPs detail which categories of persons under the Act are liable for detention and for what purposes:³²

Persons liable for arrest and detention	Purpose for which person may be arrested and detained
persons who are liable for turnaround	to detain the person in order to place him or her on the first available craft leaving New Zealand
persons who are liable for deportation (including persons recognised as refugees or protected persons but whose deportation is not prohibited under section 164(3) or (4))	to detain the person pending the making of a deportation order, including during the completion of any appeal brought by the person against his or her liability for deportation; or to deport the person following the making of a deportation order by placing him or her on the first available craft leaving New Zealand

³¹ SOPs, Investigation, Planning and Conducting field work / operations, at 118.

³² SOPs, Detention and Monitoring, Overview, at 406.

persons who are suspected by an immigration officer or a constable to be liable for deportation or turnaround and who fail to supply satisfactory evidence of their identity when requested under section 280	to detain the person pending satisfactory establishment of the person's identity
persons who are, on reasonable grounds, suspected by an immigration officer or a constable of constituting a threat or risk to security	to detain the person pending the making of a deportation order; or if the person is subject to a deportation order under section 163, to deport the person by placing him or her on the first available craft leaving New Zealand

COs have discretion in deciding whether to detain an unlawful person, subject to the SOPs where COs must:³³

- Confirm the identity and status of the person using Police, AMS and the client file before initiating detention.
- Consider whether the person could enter a Residence and Reporting Requirements Agreement rather than effecting detention or applying for a warrant of commitment.
- If necessary, prepare a deportation order.

A person who is liable for arrest and detention can enter into a RRRA with INZ without Court intervention.³⁴ The RRRA requirements are provided for in the SOPs.³⁵

The first step is to determine whether to offer the person a residence and reporting agreement. This is in the absolute discretion of the CO under section 11 and 177.

The SOPs note that “it may be appropriate to enter an RRRA where a person has a stable residential address, ties to the community, and the risk of absconding can be managed through reporting and other imposed conditions.”³⁶

The purpose of the RRRA is stated to “manage appropriately persons liable for arrest and detention who pose a low to moderate flight risk and low safety risk to the community.”³⁷ The following guidance notes are provided:³⁸

Best Practice

- Discuss with your Technical Advisor or Immigration Manager whether an RRRA would be appropriate.
- Monitor residence and reporting requirements to ensure compliance.
- Review all RRRAAs to ensure that any changes in circumstances can be considered, and to monitor progress on the primary case.

Before you begin

- Establish whether the person’s circumstances which would make an RRRA appropriate by using Police, AMS and the client file. Relevant information may also be obtained during the Record of Personal Circumstances process.
- Prepare a draft Residence and Reporting Requirements Agreement.

³³ SOPs, Detention and Monitoring, before you begin, at 410.

³⁴ Immigration Act 2009, s 315.

³⁵ SOPs, Residence and Reporting requirements agreements, at 474.

³⁶ Ibid.

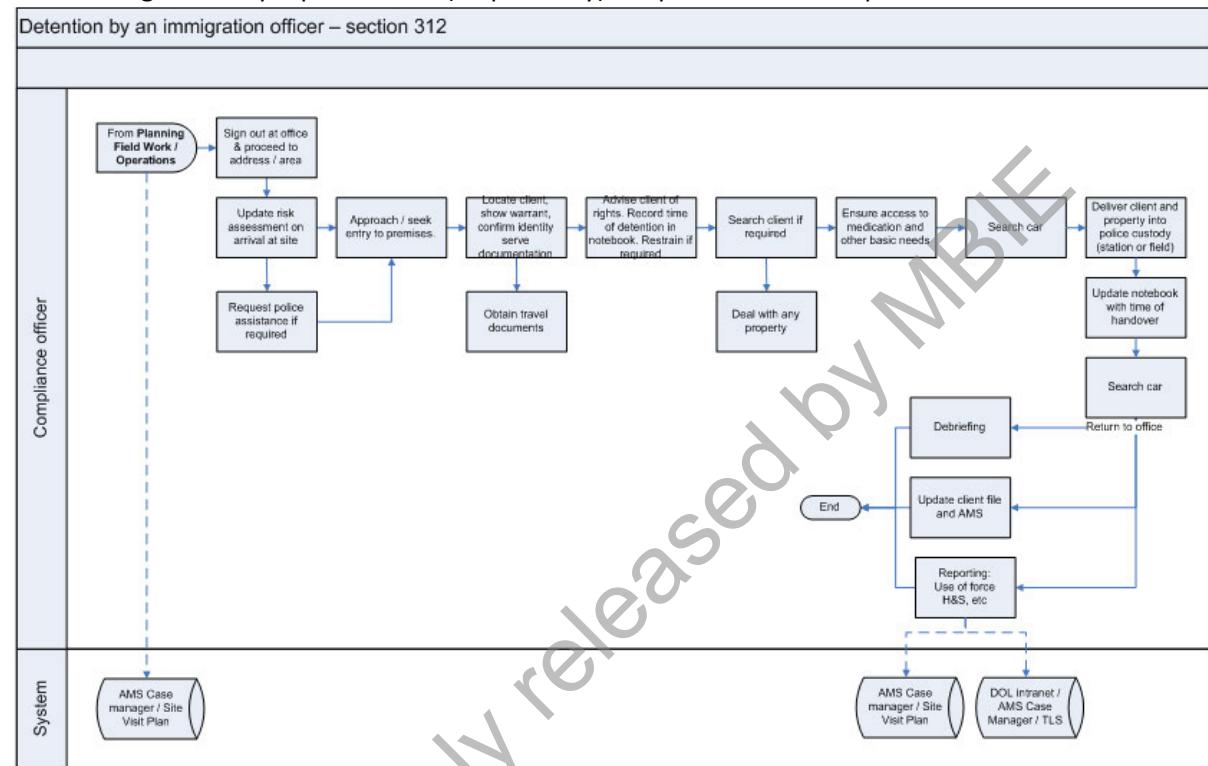
³⁷ SOPs, Residence and Reporting requirements agreements, at 470.

³⁸ Ibid.

If a RRRA is required, the details are recorded in the AMS Case Manager including the start date, reporting day, and reporting agency.³⁹

Other steps include monitoring compliance to ensure that if the person fails to comply with an agreed requirement without reasonable excuse, they may be detained by an immigration officer under section 312 or 313.

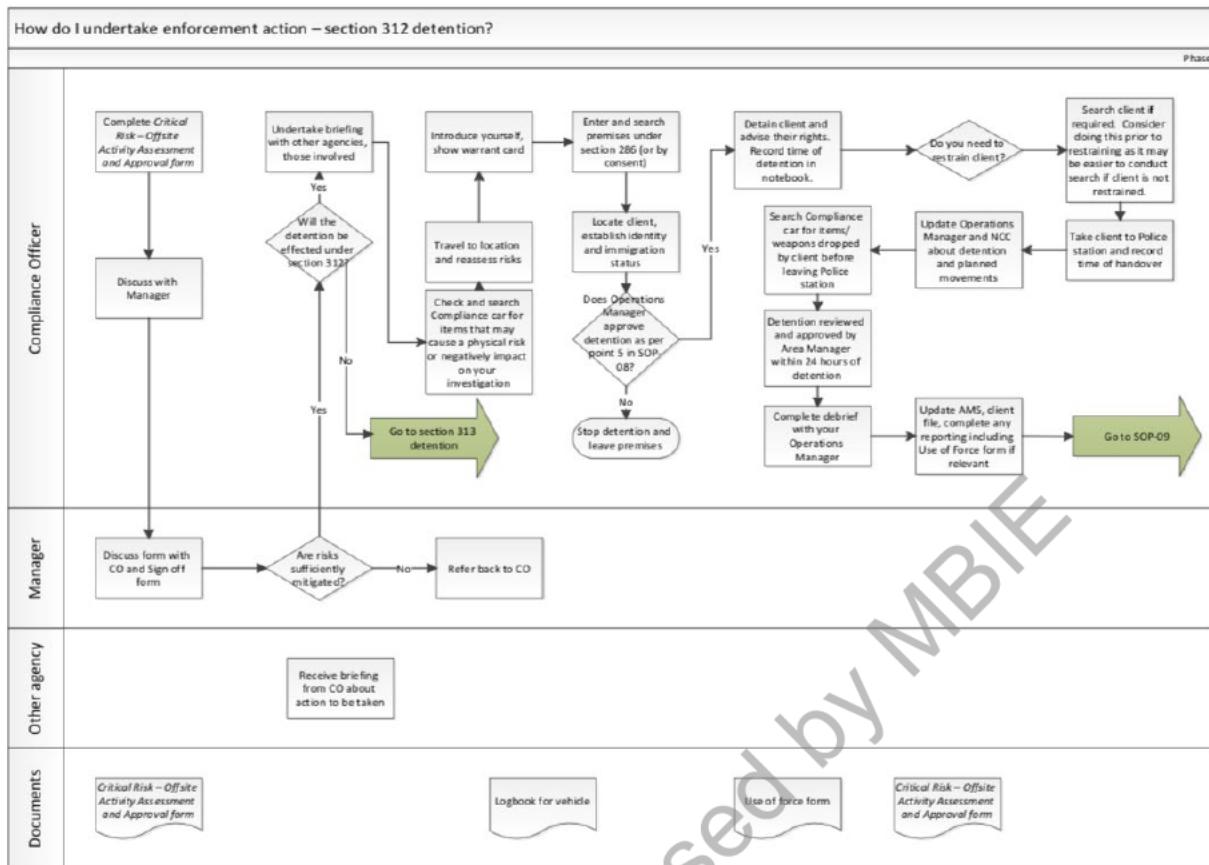
The existing and the proposed SOPs (respectively) are provided for comparison below.⁴⁰



³⁹ SOPs, Residence and Reporting requirements agreements, at 474. Under an RRRA a person liable for detention and arrest may agree to:

- to reside at a specified place;
- report to a specified place at specified periods or times in a specified manner;
- provide a guarantor who is responsible for ensuring the person complies with any agreed requirement and reports any failure to comply with those requirements;
- attend any interview with a Refugee Protection Officer or hearing with the Tribunal relating to any claim for refugee or protected persons status; or
- undertake any action to facilitate the person's deportation or departure from New Zealand.

⁴⁰ SOPs, Process Map: Detention by an immigration officer – section 312, at 418.



The SOPs are improved by the addition of steps to ensure COs consult with managers at critical decision-making stages in the process. It is clearer to the CO which forms to complete at each step within the detention function.

Escalating Sensitive Matters

The current SOPs provides guidance on when and how to complete the form to escalate sensitive matters. If a CO thinks it is required after deciding to proceed with deportation, he or she should complete the required escalation information.⁴¹ There is no express guidance in the proposed SOPs on what factors might cause a CO to raise this. But there are tasks suggested in the existing SOPs for COs depending on what they decide.⁴²

If you...	Then...
decide to proceed with the deportation	obtain authorisation from your technical advisor or immigration manager. Raise Case Activity = (type Case Review) to record authorisation. The activity would be assigned to the advisor or manager who is undertaking the review, to complete.
identified the need for the involvement of multiple agencies, addresses or client	prepare a SMEAC for the operation.
identify potential risks	go to preparing a [escalation process].

⁴¹ SOPs draft, 'How do I undertake enforcement action – detention?', Step 1.

⁴² SOPs, Deportation, Steps: Ensuring a client meets deportation criteria, at 207.

Common risks which could be identified prior to or during compliance action, include where:⁴³

- the client is from a 'non-returnable' country and, if given the opportunity to do so, has not regularised their status within 30 days of being advised to do so (either because they did not request this, or were declined on request);
- there are children involved, and the rights of the child need to be considered;
- the client has family living lawfully in NZ;
- there are medical issues/conditions, with a cost to the NZ taxpayer and/or that cannot be treated from the client's home country;
- the client is elderly;
- the client has lived in NZ for a significant amount of time;
- there may be media interest in the case;
- the client has character issues;
- the client has indicated that legal action may be pursued against INZ; or
- the costs of executing the deportation are likely to be high.

Where these factors are identified, the CO needs to ensure an appropriate form is completed and then forwarded to the manager prior to any compliance action taking place.⁴⁴ Following Mr Middleton and Ms L, this step appears to be emphasised by managers with greater discussions between COs, and with managers on appropriate case management. However, this depends heavily on COs judging when to escalate information to managers or colleagues. The type of risk identified is summarised in this table:⁴⁵

Risk type	Description
Media	Potential for media interest resulting from action taken by INZ, or the client's character issues or circumstances.
Operational	Where there is some operational risk or difficulty for INZ (or associated agencies), for example: <ul style="list-style-type: none">• Difficulty in deporting client (e.g. not fit to travel, unable to obtain appropriate travel documentation);• Risk in keeping client in custody (e.g. suicidal, health issues, violent behaviour); or• High costs of executing a deportation.
Reputational and/or political	Where there is the potential to damage INZ's reputation and/or issues of political interest for example: <ul style="list-style-type: none">• Media interest or public perception that client should / should not be deported – this may arise from criminal offending, dishonesty or fraud to INZ in coming to NZ, failed refugee or protection claim etc.;• Cost of medical treatment for client in NZ;• Treatment unavailable in home country;• NZ citizen children;• Custodial deportation for both parents would involve CYF;• Minister has declined to intervene, and there are difficulties in deporting; or• Returning a non-returnable client.

The new SOPs therefore should retain guidance from the existing SOPs on identifying what risks are potentially sensitive issues to escalate. The Best Practice guidelines in the SOPs are that all compliance

⁴³ SOPs, Preparing a sensitive issue fact sheet, at 174.

⁴⁴ SOPs, Steps: Completing a sensitive issue fact sheet, at 176 - 177. Step 5: "Forward the Sensitive Issue Fact Sheet to your Immigration Manager, and cc the Branch Manager. Your manager will make recommendations and escalate the risk further if required. Do not proceed with any compliance action until you have received instructions from your manager."

⁴⁵ SOPs, Steps: Completing a sensitive issue fact sheet, at 176 - 177.

action involving minors requires the escalation process to be completed. Where the case is especially sensitive, this may be escalated for formal approval by the Manager, Fraud and Compliance.⁴⁶ In addition, if there is, or may be, media interest in a case, MBIE's external communications team is notified.

There appears to be more emphasis in the new SOPs as to communication with managers but less guidance on what is deemed appropriate to escalate to managers. Guidance on principles based on the highest risk priorities would be helpful to both COs and managers. The escalation process under current settings remains a work in progress as there is still some uncertainty as to when to escalate matters and what issues are truly sensitive.

The Record of Personal Circumstances Interview or Deportation Interview

Immigration officers must conduct interviews with potential unlawful persons for the purpose of determining under section 177 any international obligations New Zealand may have which might be triggered by the unlawful person's personal circumstances. One of the new forms as part of a review of the SOPs is the Deportation Interview Form.⁴⁷

Prior to this review, Immigration officers would fill out an RoPC form. This RoPC form had 13 sections and 28 pages. The final page headed "Decision" required the officer to tick a box to confirm that the person's personal circumstances had been recorded in the form. It required the officer to indicate whether those circumstances engaged New Zealand's international obligations as relevant to the decision and if so to list those obligations considered.

In *Fang*,⁴⁸ the Court held, where an immigration officer is required to have regard to New Zealand's international obligations in the course of considering the cancellation of a DO, the immigration officer is required to make a specific record of the facts which prompted reference to those obligations. In this case, the completion of the RoPC form (which was answered in the affirmative and various international obligations were listed), was not compliant as there was no record of the facts of Mr Fang's personal circumstances which triggered these obligations. The Court therefore qualified an immigration officer's discretion by the need to consider any information which is relevant to New Zealand's international obligations, in the event that the unlawful person provides information concerning the unlawful person's personal circumstances.⁴⁹ In that event, the immigration officer is obliged to consider cancellation of the deportation order.⁵⁰

Changes to this RoPC interview in the form of a proposed new Deportation Interview Form are:

- (ix) An abbreviated details section, allowing the officers or third parties present to be noted (Section A)
- (x) The additional requirements of the unlawful person to sign at key sections where the CO is engaging with the client.

⁴⁶ Or the equivalent Manager post-restructure of CRIS in 2014.

⁴⁷ INZ Deportation Interview Form 4.0.

⁴⁸ *Fang v Ministry of Business, Innovation and Employment* [2017] 3 NZLR 316.

⁴⁹ At [42] and [45].

⁵⁰ Immigration Act 2009, s 177(2).

- (xi) Under Section B detailing legal representation, the Deportation Interview Form provides greater guidance if the unlawful person wishes to speak with a lawyer or a licensed immigration advisor.⁵¹
- (xii) There is a new Caution requirement (Section B8) which guides the CO to ask that any information provided “must be truthful and complete”.
- (xiii) Section C1 of the Deportation Interview Form adds in the additional record of the reason the interview ended.
- (xiv) Under Section C of the Deportation Interview Form, there is a difference in the emphasis of previous immigration, deportation or overstaying history of the unlawful person in New Zealand or overseas. What is removed from the current RoPC are the following questions in place of a general question about anything else which the unlawful person wishes to tell the CO.
 - H5: “What will be the effect on you if you have to return to your home country?”; and
 - H6: What attempts have you made to regularise your immigration status since you have been unlawful?”
- (xv) Section D4 of the Deportation Interview Form adds in ‘Potentially Prejudicial Information’ which is a new section from the RoPC.
- (xvi) If the interview was recorded, the unlawful person can request a copy be sent to them or their representative (Section D5).
- (xvii) There are changes to the structure of the section 177 decision by the CO in response to the *Fang* decision. The RoPC had more prompts of personal circumstances than the proposed Deportation Interview Form. There is also now a distinct separate section between the consideration of relevant international obligations (Section E) and a decision section where the CO is to detail the personal circumstances (Section F).
- (xviii) The Deportation Interview Form also prompts the CO on whether the unlawful person is a potential refugee or has existing claims to the Immigration Protection Tribunal (IPT).

As the current SOPs process map provides, the escalation process could be followed after the Deportation Interview (or RoPC interview) if there are risks which are identified from the personal circumstances provided by the unlawful person.

⁵¹ The current RoPC interview guided the compliance officer that if the unlawful person wishes to talk to a lawyer or adviser, the steps taken to facilitate that request should be documented. If the compliance officer was unable to arrange this, then to describe what the impediments were. The RoPC further guides the compliance officer to explain to the person the steps taken to arrange contact, or if unable to arrange contact, to inform the person and decide whether or not to proceed with the RoPC. The Deportation Interview form provides that the compliance officer should “Obtain details of lawyer/advisor, pause interview stating time and reason for pause. Contact lawyer / advisor give client an opportunity to speak with them in private (by phone). If lawyer unavailable and/or you cannot get another lawyer, you may need to end interview recording time and reason on page 7. (If circumstances allow, you may schedule interview for lawyer to be present, however do not delay deportation to accommodate lawyer.)” The legislative framework places time limits on Compliance Officers and accordingly on delay to obtain advice (see the discussion in Appendix 2 below).

Similarly, COs could decide after receiving more information from the Deportation Interview, to release the unlawful person until further action is decided, where he or she thinks it is appropriate. Such circumstances may include:⁵²

- To allow a person to remain in the community, with their family and continue working in accordance with any visa they hold while they appeal their deportation liability;
- To allow a person the opportunity to make arrangements to depart voluntarily;
- To allow a person to remain in the community while waiting for a travel document or flight to become available;
- To allow a person to remain in the community who although they may be liable for deportation, has been granted a temporary stay as a result of legal proceedings;
- To allow a primary caregiver to remain with a minor in the community; or
- To allow a person the opportunity to remain in the community in order to access medical treatment/care

However, the SOPs do not provide detailed guidance on whether a person is or is not to be detained. An understanding of the prioritisation decisions where COs have discretion and where managers are likely to help COs determine whether to investigate, detain or deport, will help COs assess when cases may be of more or less sensitivity. Whether this is better detailed within SOPs or through general training should be considered by INZ.

The style of the proposed SOPs (a sample that have been reviewed) appear more practical and helpful with less repetitive detail. The framing of the SOPs with questions as steps in the designated process help COs to focus on the discretion they have as to how to manage the case and to identify any sensitive issues or risks from both their preliminary investigations until the case is resolved. This is likely to have more ongoing utility for COs than the previous SOPs.

⁵² SOPs, Steps: Residence and Reporting requirements agreements, at 475.

Appendix

1. Terms of Reference
2. Summary of Legal and Regulatory Framework
3. Compliance Removal Priorities List

Proactively released by MBIE

Appendix 1: Terms of Reference

Dated 8 June 2018

Purpose

1. The purpose of this document is to set out the Terms of Reference for performing a review of the Immigration detention and deportation processes, practises and operating model undertaken by the Compliance function ('Compliance') operating within the Immigration NZ ('INZ') Compliance Risk and Intelligence Service ('CRIS') branch.
2. The review will specifically examine whether INZ Standard Operating Procedures ('SOPs') are being followed and sufficiently robust to ensure that sound, risk based decisions are made. Where merited, opportunities for strengthening existing approaches will be identified.

Background

3. During the course of 2018, a number of decisions by INZ Compliance became high profile or had sensitivity factors. While the legality of such decisions was subsequently assessed as sound, questions were raised around how cases had been handled, why such cases had been prioritised and thus whether SOPs, and their application, were operating effectively.

Objective

4. The objectives of this review are to:
 - a. Understand the roles and responsibilities within the Compliance function, and their engagement of / relationship with, MBIE support functions - specifically Legal and Communications.
 - b. Assess whether the operating practices, processes, oversight and ways of working are designed to support appropriate risk based decision making. This will include determining:
 - whether INZ Induction, Designation and other training equips INZ Compliance staff to make appropriate, risk based decisions.
 - whether the level of quality controls and management oversight is adequate and consistently applied across the function.
 - the process for identifying the need to, and communicating with, National Office/ other key stakeholders, for escalating material matters of public interest to enable key stakeholders to be fully informed should issues arise from Compliance activities that are undertaken.
 - c. Reviewing the appropriateness of INZ Compliance Standard Operating Procedures and, where required, make recommendations to strengthen procedures, controls or risk mitigation where necessary.
 - d. Determining whether there are any organisational values or beliefs that could be barriers to consistent and appropriate risk-based decisions and/ or practices.
 - e. Making recommendations to strengthen the approach INZ Compliance take to their work.

Scope

5. The review will look at processes, communications and activities undertaken in the prioritising of, and determining whether to proceed with, detention and deportation activities in specific cases.

6. Excluded from scope:

- Any non-detention or deportation related compliance activities e.g. Investigations
- The activities of the Border Operations team(s), including the handling of asylum claims.
- Any employment related issues.

Approach

7. The following approach will be taken in conducting this review:

- Interview INZ Compliance staff (both frontline and management) and relevant MBIE staff who support the function such as legal and communications
- Review relevant documents to build understanding of INZ Compliance processes including, but not limited to:
 - The requirements of the Immigration Act and associated regulations
 - INZ Standard Operating Procedures
 - INZ Induction, Designation and other training documents.

Determine and select a sample of case files from across the four main offices (Auckland, Christchurch, Hamilton and Porirua) and test for compliance to relevant statutory and INZ procedural requirements.

Specifically review and report on the legal and process practices followed for the:

- Mark Middleton case
- Ms L case

Deliverables

11. A draft report will be prepared containing the results of the review, summarising the findings and providing recommendations for any improvement opportunities. The draft report will be issued to those interviewed during/ potentially impacted by the findings of the review to obtain feedback and agree actions and timeframes to implement the report's recommendations.

12. A final report will be issued to the review Sponsor once all agreed actions have been received and updated in the report.

Appendix 2: Summary of Legal and Regulatory Framework

The legal framework covering deportation and detention activity includes the Immigration Act 2009, the Immigration (Certificate, Warrant, and Other Forms) Regulations 2010 and a number of international conventions and treaties to which New Zealand is a signatory (New Zealand's international obligations). Other legal guidance might be relevant such as the compliance related chapters of the INZ Operational Manual, SOPs, Internal Administration Circulars, or decisions made by the Courts or the IPT.

The Immigration Act 2009

The Immigration Act (the Act) has the purpose of managing immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.⁵³

To achieve this purpose, it establishes an immigration system that, amongst other things:

- (i) requires persons who are not New Zealand citizens, to enter and be in New Zealand only if the person is the holder of a visa and he or she has been granted entry permission;⁵⁴ and
- (ii) includes mechanisms to ensure that those who engage with the immigration system comply with its requirements, including mechanisms that “prescribe the system for the deportation of people who are not New Zealand citizens and who fail to comply with immigration requirements, commit criminal offences, or are considered to be a threat or risk to security”.⁵⁵

The immigration framework generally requires individual compliance with the scheme. Accordingly, as an incentive, the Act provides greater rights to persons who are lawfully, as opposed to unlawfully, in New Zealand. For example, the Act establishes a system where any person who is lawfully in New Zealand (enfranchised and engaged with the system) is entitled to:

- make applications for further visas, including of a type of their choice;
- receive reasons for decision making;⁵⁶
- apply for reconsideration of an unfavourable decision;⁵⁷
- work and study in New Zealand, consistent with the conditions of their visa;⁵⁸
- remain in New Zealand in accordance with their visa;
- seek a humanitarian exception by appeal to the Immigration and Protection Tribunal, with associated procedural protections and entitlement to a written, reasoned decision; and
- appeal to the higher courts on points of law.

By contrast, persons who are unlawfully in New Zealand (disenfranchised from the system) have very limited rights with the effect that they –

- have an obligation to leave New Zealand⁵⁹;

⁵³ Immigration Act 2009, s 3(1).

⁵⁴ Immigration Act 2009, ss 3(2)(a)(ii), 14(1)(b),

⁵⁵ Immigration Act 2009, s 3(2)(e)(ii)

⁵⁶ Immigration Act 2009, s 27.

⁵⁷ Immigration Act 2009, s 185.

⁵⁸ See generally, Immigration Act 2009, ss 73(d), (e), 74(1)(b)(ii) and (iii), 77(4).

⁵⁹ S18(1)

- may not apply for a visa;⁶⁰
- may not work in New Zealand;⁶¹
- may not study in New Zealand (except in compulsory education);⁶² and
- are liable for deportation.⁶³

The only rights provided by the Act to persons who are unlawfully in New Zealand are:

- in some circumstances, a right to appeal to the Immigration and Protection Tribunal, within 42 days of becoming unlawful, on humanitarian grounds against the requirement to leave New Zealand;⁶⁴ and
- if served with a deportation order, the right to have cancellation of the deportation order formally **considered** if the person “provides information ... concerning his or her personal circumstances, and the information is relevant to New Zealand’s international obligations” (section 177 of the Act); and
- the right to, at any stage, make a claim for refugee or protection status

Deportation

Part 6 of the Act sets out:

- When a person is liable for deportation;
- How that liability must be communicated to that person;
- The consequences of the liability for the person;
- Specifies the only situations in which an appeal right exists in respect of that liability; and
- Provides for the person’s deportation to be executed without the need for further inquiries if no appeal is made or an appeal is unsuccessful⁶⁵.

Although there are a range of ways in which a person may become liable for deportation, it is my understanding that the vast majority of deportation cases that are managed by compliance officers are persons who are liable for deportation on the basis that they are:

- unlawfully in New Zealand;⁶⁶ or
- temporary entry class visa holders in respect of whom it has been determined that there is “sufficient reason” to deport that person.⁶⁷

In general, the deportation process can be initiated by:

1. Service of a DLN which informs the person of their liability for deportation, and outlines any rights of appeal; or
2. Service of a DO which authorises the deportation of a person from New Zealand if there are no further rights of appeal or impediments to deportation.

⁶⁰ S20

⁶¹ S21(a)

⁶² S21(b)

⁶³ S154

⁶⁴ S154(2)

⁶⁵ S153 sets out the purpose of Part 6 of the Act

⁶⁶ S154

⁶⁷ s157. In general, compliance officers have been delegated the power of the Minister to determine that there is sufficient reason to deport a temporary entry class visa holder – see schedule 4 of the delegation of powers to the Ministry of Business, Innovation and Employment (A15.5 of the INZ Operational Manual).

Except for people who are liable for deportation on the basis of being in New Zealand unlawfully, all other people in New Zealand who subsequently become liable for deportation have to be formally notified of that liability by the service of a Deportation Liability Notice (**DLN**).⁶⁸

By contrast, there is no requirement to serve a person unlawfully in New Zealand under section 154 with a DLN. Those persons who are liable for deportation on the basis of being in New Zealand unlawfully are directly served with a Deportation Order (**DO**). Those unlawfully in New Zealand are liable for deportation by operation of law and have very limited rights⁶⁹

In terms of regularising their status, the other avenue for persons unlawfully in New Zealand (in respect of whom a deportation order is not in force) is to request that the Minister, or their delegate, grant them a visa.⁷⁰ This decision is the discretion of a decision maker and may not be applied for.⁷¹ If a person purports to apply, there is no obligation on a decision maker to consider the application. Whether the application is considered or not, the decision maker is not obliged to give reasons for any decision relating to the purported application (and the Privacy Act or Official Information Act does not apply in respect of the purported application).

The restriction of rights in “absolute discretion” decision making (such as in the context of section 61 and section 177 discussed below) reflect the need for finality in immigration decision making in respect of individuals on whom the scheme of the Act has imposed an obligation to depart New Zealand. The restrictions on rights are intended by the statute to achieve a high level of compliance with immigration law and, in particular, ensure that persons who do not meet immigration rules and procedures are not advantaged over those who do comply.

An immigration officer has the power, in his or her discretion, to cancel a DO served on a person unlawfully in New Zealand.⁷² Whilst no person has the right to apply for this cancellation, an immigration officer must consider cancelling the deportation order of a person who is in New Zealand if the person provides information concerning his or her personal circumstances, and the information is relevant to New Zealand’s international obligations.⁷³

Section 177(5) below details the scope of an immigration officer’s recording obligations:

- (5) However, to the extent that an immigration officer does have regard to any international obligations, the officer is obliged to record—
(a) a description of the international obligations; and
(b) the facts about the person’s personal circumstances.

Compliance officers

The Chief Executive (delegated to the Deputy Chief Executive of INZ) may designate persons employed by the Department⁷⁴ who are necessary and “suitably trained and qualified” as immigration officers.⁷⁵ The Chief Executive must also specify which functions and powers an immigration officer is authorised

⁶⁸ Immigration Act 2009, s 170 and 286.

⁶⁹ Immigration Act 2009, s 154.

⁷⁰ Immigration Act 2009, s 61.

⁷¹ Immigration Act 2009, s 11.

⁷² Immigration Act 2009, s 177(1).

⁷³ Ibid.

⁷⁴ That Department is the Ministry of Business, Innovation and Employment.

⁷⁵ Immigration Act 2009, s 388(1).

to exercise, and an officer may not perform any functions or exercise any powers under the Act unless they are specifically authorised to do so.⁷⁶ “Compliance and enforcement functions and powers, being the powers set out in Part 8” and “the power of detention, being the power set out in section 312” are two classes of functions and powers which an immigration officer may be authorised to perform.

Detention

Part 9 of the Act establishes a “tiered detention and monitoring regime in order to ensure...the integrity of the immigration system through providing **for the management of persons** who are liable for deportation or turnaround”.⁷⁷

Section 309 sets out those persons who are liable for arrest and detention under the Act, whilst section 310 sets out the purposes for which arrest and detention may be exercised.

In the case of persons who are liable for deportation, the powers of arrest and detention may be exercised for the purpose of:

- Detaining the person pending the making of a DO, including during the completion of any appeal brought by the person against his or her liability for deportation;⁷⁸ or
- Deporting the person following the making of a DO by “placing him or her on the first available craft leaving New Zealand”.⁷⁹

If the person fails to comply with the Immigration Officer’s request to depart, arrest and detention powers may be exercised to detain the person pending satisfactory establishment of their identity.⁸⁰ The person may only be detained as long as necessary to achieve this purpose of detention.

Properly authorised COs have a limited power of detention for up to 4 hours.⁸¹

If it becomes apparent that the purpose of detention will not be fulfilled, the CO may request that a constable arrest and detain a person for up to 96 hours (inclusive of any period of time during which the person has been detained).⁸²

If it becomes apparent that the purpose of detention will not be met within the 96 hours, a CO may apply to a District Court Judge for a warrant of commitment authorising detention for up to 28 days.⁸³ At each step in the deportation process, rather than deciding further detention is necessary, a CO may decide that a person who is liable for deportation should be released on a residence and reporting agreement until departure or cancellation of the DO.⁸⁴

It should be noted that the management options provided in Part 9 supplement non-statutory forms of management available to COs such as regular communication and negotiating voluntary

⁷⁶ Immigration Act 2009, s 388(2).

⁷⁷ Immigration Act 2009, s 307.

⁷⁸ Immigration Act 2009, s 310(b)(i).

⁷⁹ Immigration Act 2009, s 310(b)(ii) where “first available craft” refer to the first available craft once all impediments to deportation are overcome.

⁸⁰ Immigration Act 2009, s 310(c).

⁸¹ Immigration Act 2009, s 312.

⁸² Immigration Act 2009, s 313(1).

⁸³ Immigration Act 2009, s 316.

⁸⁴ Immigration Act 2009, s 315.

deportation without the need to resort to more formal management as set out in the Act. It is for the discretion of a CO, based on the risk that a particular case presents, to determine what level of management is necessary in any particular case.

INZ Operational Manual (Certified Immigration Instructions and Operational Instructions)

Operational Instructions relating to compliance activities are found in the INZ Operational Manual. Of relevance to this review is the chapter on compliance, which was updated on 20 March 2018.

The INZ Operational Manual contains information helpful for COs in practice in their day to day activities. It references the Act but distils the law into a user-friendly format.

For instance, it is noted that there may be times where people unlawfully in New Zealand are arrested by Police and placed in custody because they have committed other offences. Because action in relation to other offences takes precedence over deportation, it notes that it may not be possible to proceed with deportation immediately.⁸⁵ This appears to be the basis for COs waiting until Police have resolved their matters before proceeding with deportation.

Another example is the note that information alleging a person may be in New Zealand unlawfully can come from a variety of sources. Where anonymous information is given, an immigration officer must verify such information to the extent that they are satisfied there is good cause to suspect that a particular person is in New Zealand unlawfully or is otherwise liable for deportation. This may be achieved by establishing a person's identity and immigration status from Immigration New Zealand files or database or other documentation.⁸⁶

In particular, immigration officers will also wait while applications for refugee status are being determined. This is reinforced in the Manual where it states, “[n]o person who is recognised as a refugee or a protected person, nor a claimant, may be deported under the Immigration Act 2009”.⁸⁷

The INZ Operational Manual was not the focus of this review, but it is noted that the chapters do not appear to be routinely updated. Where aspects of the Operational Manual are out of date, or not a frequent point of reference for COs, the utility value of the Instructions appear minimal.

⁸⁵ INZ Operational Manual, D2.10.30, dealing with people unlawfully in New Zealand arrested for other offences.

⁸⁶ INZ Operational Manual, D2.25.1, dealing with information on people suspected of being liable for deportation.

⁸⁷ Immigration Act 2009, section 164 and INZ Operational Manual, D2.20, dealing with limitations on deportation.

Appendix 3: Compliance Removal Priorities List



Department of Labour
TE TARI MAHI



Changes to coding for all "Deportations" as per new "Priority List" @01.01.2011.

Currently all the expenditure for deportations is coded under four (4) main cost centres. (although we do have some instances directly at the border). All deportations are instigated as per our current "Priority List" (as listed below). Under the new FMIS Accounting system, we no longer require the "activity code" and all expenditure relating to a deportation should be coded xxxx_3535_xxxx. (cost centre_nominal_internal reference code)

2603_3535: Border Compliance Operations – Northern

2605_3535: Removals Refugees

2607_3535: Detention

2620_3535: Border Compliance Operations – Central/Southern

COMPLIANCE REMOVAL PRIORITIES

6(c)

